

## **Courts and Tribunals (Judiciary and Functions of Staff) Bill**

### **Factsheet: Authorised Court and Tribunal Staff - legal advice and judicial functions**

#### **Introduction**

1. HM Courts and Tribunals Service (HMCTS) staff can already be authorised to exercise a range of judicial functions. However, arrangements differ between jurisdictions, which means that judicial oversight is unclear, safeguards (including guarantees of independence) are incomplete, and there are gaps in provision.
2. Using authorised staff to handle a wider range of uncontroversial and routine matters under judicial supervision will allow our judiciary to focus their expertise on complex cases and help to improve the efficiency and effectiveness of the courts and tribunals. It will increase the support provided to judges, magistrates and tribunal members, and ensure that case management and preparation issues can be resolved at an appropriate and proportionate level.
3. To enable greater and more effective use of authorised staff, we need to ensure that there is a robust approach to authorisation in place and introduce an underpinning framework of accountability. There should be a statutory guarantee of independence for authorised court and tribunal staff in all jurisdictions when exercising judicial functions, and the gaps and inconsistencies within and across jurisdictions should be addressed.
4. To ensure that staff in these roles come under the leadership of lawyers, with ultimate responsibility to judges, the Government is also removing the role of justices' clerk from statute. The statutory restrictions around the justices' clerk role will be removed so that these senior lawyers can take a leadership role across all jurisdictions, as Heads of Legal Operations.

#### **What is the current position?**

5. Provision already exists for staff to exercise judicial functions in virtually all courts and tribunals up to and including the High Court and Upper Tribunal. The Crown Court is a notable exception. Examples of authorised staff roles include legal advisers in family and magistrates' courts, lawyers in the Court of Appeal and Authorised Court Officers in the Court of Protection.
6. In the Crown Court, the activities of court officers are restricted to "formal and administrative matters"<sup>1</sup>. This means that the judiciary must carry out all case management functions, including routine tasks such as changes to the starting time of a hearing, or changing the pre-trial preparation hearing date, even where the parties are all in agreement.
7. In the civil jurisdiction, the Civil Procedure Rule Committee<sup>2</sup> may assign functions to court staff. A similar power exists in relation to the First-tier Tribunal and Upper Tribunal, although the Tribunal Procedure Committee has delegated this power to the Senior President of Tribunals, who exercises the power via Practice Statements.
8. In the magistrates' courts and the family jurisdiction, justices' clerks and legal advisers already exercise judicial functions. The Lord Chancellor, with the concurrence of the Lord Chief Justice, identifies which powers of a single justice (in the magistrates' court) or which functions of the family court or a judge of the family court can be exercised by a justices' clerk, and makes rules to that effect. Rules also allow assistant clerks (legal advisers) to carry out any functions delegated to justices' clerks.

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<sup>1</sup> Senior Courts Act 1981, s82

<sup>2</sup> The Civil Procedure Rule Committee is an independent committee whose role is to make and amend Civil Procedure Rules, which govern the way civil cases are managed and set out the processes of the civil courts. Other jurisdictions have analogous rules committees, including the Criminal Procedure Rule Committee, the Family Procedure Rule Committee, and the Tribunal Procedure Committee.

## What are the proposed changes?

9. The measures in the Bill mean that:

- It will be possible for HMCTS staff to be authorised to exercise judicial functions of any court or tribunal for which HMCTS is responsible<sup>3</sup>, extending the current arrangements. A member of staff will only be able to exercise judicial functions once authorised to do so by the Lord Chief Justice or his nominee (for courts) or the Senior President of Tribunals or his delegate (for tribunals).
- The independent jurisdictional rule committees will decide which functions authorised staff may exercise (subject to statutory restrictions), so that the powers are subject to appropriate scrutiny by judges and practitioners. Staff will also need to meet minimum requirements set by the committees as to qualifications and experience before they can be authorised. This will all be set out in procedure rules, which are subject to parliamentary scrutiny.
- Safeguards will be introduced for authorised staff across all jurisdictions to ensure that they have the necessary independence to carry out judicial functions under the supervision of the judiciary. Other safeguards include protection for authorised persons from legal proceedings, costs in legal proceedings, and indemnification in respect of anything they do or do not do when exercising, in good faith, judicial functions.
- The role of justices' clerk will be removed from statute, to enable the creation of a more flexible, cross-jurisdictional leadership role for authorised staff. This will also mean that all lawyers who exercise judicial functions will only be subject to direction by the Lord Chief Justice (or his nominee) or the Senior President of Tribunals (or his delegate) in the future.
- The Lord Chief Justice and the Senior President of Tribunals will be ultimately responsible for the assignment and direction of these staff.

10. In future, we expect that authorised staff may be able to carry out a wider range of routine judicial functions, including case management powers and some mediation roles. These will be characterised as interlocutory or preparatory in nature, such as issuing a witness summons; taking pleas; or extending time for service of (various) applications. These functions are unlikely to involve determining the outcome of a contested matter but may involve deciding a contested issue within the management of a case (such as the date for a hearing). Decisions about which judicial functions authorised staff may exercise will be made by the relevant procedure rule committee, subject to statutory restrictions as some functions are prohibited by the Bill.

11. Some authorised staff will provide legal advice to lay justices in the magistrates' courts and judges of the family court, a role which is currently undertaken by justices' clerks and legal advisers. Authorised staff who give legal advice will need certain legal qualifications, which will be set out in regulations (made by the Lord Chancellor) and subject to parliamentary scrutiny, as is the case now.

12. Authorised staff who exercise judicial functions will need to meet criteria set by the rule committees as to qualifications and experience relevant to those functions. This is likely to vary according to the functions that the different jurisdictional committees decide these staff may carry out. The training needs of authorised staff exercising judicial functions will be assessed on appointment and may vary between individuals depending on their previous experience, knowledge and skills. There will be training for authorised staff on key judicial skills and ethics.

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<sup>3</sup> The notable exception to this is the employment tribunals and Employment Appeal Tribunal. This is because, unlike other courts and tribunals, the rules in the employment jurisdictions are not currently made by an independent rule committee, which this legislation is reliant upon. However, the Government anticipates the inclusion of measures to enable the flexible use of authorised staff alongside wider employment tribunal reforms in due course.